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Employment Equality in Ireland: the New Act

Introduction

The Employment Equality Act, 1998, came into force in Ireland on 18 October 1999, following a prolonged period of preparation necessary to establish the new equality enforcement mechanisms and bodies prescribed by the Act. The Act effectively replicates much of the previous legislation repealed by it, but also implements enormous changes in Irish law. It introduces an entire new range of prohibited grounds for discrimination, a new court structure and explicit measures on sexual and other forms of harassment, and it is on these features that this note will concentrate. Unfortunately, the Act is structurally cumbersome, and there is reason to fear that the impact of some reformatory provisions will be vitiated by exclusions and qualifications.

Background

The Anti-Discrimination (Pay) Act, 1974, prohibited sex-based pay discrimination, and the Employment Equality Act, 1977, prohibited disparate treatment based on sex and marital status. Both Acts were flawed: for example, the 1974 Act did not define ‘like work’ as including work greater in value, and neither Act dealt expressly with indirect discrimination (difficulties resolved by the application of European jurisprudence and by taking a purposive approach to the implementation of European law (Nathan v. Bailey Gibson ([1998] ELR 51)). The 1977 Act also did not deal expressly with sexual harassment, a growing issue in Ireland. Although this was dealt with as ‘less favourable treatment based on sex’, the lack of any provisions on vicarious liability meant that it was difficult to hold an employer liable (Health Board v. BC and the Labour Court ([1994] ELR 27)).

In an attempt to address these and other difficulties, and to broaden the law on discrimination, the Irish Government introduced the Employment Equality Bill, 1996, the forerunner of the 1998 Act. Although the Bill was clearly influenced by European developments (in particular, the Social Charter, the Community Charter and the Treaty of Amsterdam), it greatly exceeded Ireland’s legal obligations by prohibiting discrimination on a broad range of new grounds. A parallel attempt to improve the position of minorities in the non-employment sphere was made by the contemporaneous Equal Status Bill. However, although both Bills were passed by the legislature, the Supreme Court found them unconstitutional (In the Matter of Article 26 of the Constitution of Ireland and in the Matter of the Employment Equality Bill, 1996 ([1997] 2 IR 321) and In the Matter of Article 26 of the Constitution of Ireland and in the Matter of the Equal Status Bill, 1996 ([1997] 2 IR 387)). The principal difficulties regarding employment related to provisions rendering employers potentially criminally liable for the discriminatory acts of employees, and requiring them to shoulder the costs of facilitating disabled workers unless this would result in ‘undue hardship’. Consequently, significant changes had to be made in the 1998 Act.

New grounds for discrimination

The most striking feature of the new Act is the inclusion of new prohibited grounds for discrimination, which go far beyond the grounds prohibited in England and Wales. Discrimination is defined as less favourable treatment based on any ‘relevant characteristic’, and may be direct or indirect. Limited positive action is permitted under sections 24 and 33. The relevant characteristics include gender, marital status, family status, sexual orientation,
race, age, disability, religion and membership of the travelling community (an Irish nomadic group). No definition of the ‘travelling community’ is included in the legislation, so that difficulties may arise in, for example, deciding whether a ‘settled’ person is a member of the group.

The most complex definition is that of ‘disability’, in section 2(1). This includes the total or partial absence of bodily or mental functions (or body parts), disfigurement, learning disorders and the presence of bodily organisms causing (or likely to cause) chronic disease. Conditions affecting a person’s thought processes, perception of reality, emotions or judgement, or resulting in disturbed behaviour, are also included. This high degree of detail was required as there are no amplifying guidelines or regulations, as provided in England and Wales under the Disability Discrimination Act, 1995. It is not necessary, as under the 1995 Act, to show that a disability has a ‘substantial or long-term adverse effect’ on a person’s ‘ability to carry out normal day-to-day activities’. Disability is not limited to a past or present condition, but may be future or imputed. Self-induced disabilities (for example, substance abuse) are not excluded in Irish law, and disabilities leading to disturbed behaviour (for example, pyromania or kleptomania) are specifically included. HIV is also more likely to be covered, as it is not necessary for an illness to have manifested itself. However, persons likely to engage in unlawful sexual behaviour need not be recruited, retained or promoted, particularly where the employment involves access to minors or vulnerable persons (section 17). Thus, limited discrimination against paedophiles is not unlawful. A criminal conviction is not required, as employers may also act on ‘other reliable information’. The potential unfairness of this may be justified by the need to protect vulnerable groups.

Owing to this broad definition, employers theoretically have very little room to manoeuvre, particularly as section 16 provides that disabled persons must be considered competent to do a job if they could do it with the help of special treatment or facilities. However, the impact of these provisions is severely diluted by later sections. Although section 16(3) requires employers to do all that is ‘reasonable’ to accommodate the needs of disabled persons, the cost to the employer must not be greater than ‘nominal’ (a result of the Supreme Court’s judgment on the 1996 Bill). The impact of this section is likely to be particularly severe where the disability is physical and the employer is a small one (though there is no exclusion of small businesses, as in England and Wales). The light employer burden is confirmed by section 34(3), which permits disability discrimination where ‘clear actuarial or other evidence’ shows that ‘significantly increased costs’ would otherwise result. ‘Nominal’ and ‘significantly increased’ costs are not defined, and it is uncertain whether the courts will set a blanket maximum, or allow a measure of discretion based on the employer’s resources. Finally, section 35 permits limited pay discrimination regarding some disabled workers.

Family status should ideally have been included under the 1977 Act, as required by the Equal Treatment Directive (Directive 76/207 EEC). It is rather restrictively defined as responsibility as a parent or guardian for a person under the age of 18, or as a parent or resident primary carer for a disabled person over 18. A primary carer who is not a parent is only protected if she resides with the disabled person. Thus, a child who is caring for a disabled parent is only protected if she lives with that parent. The section is mostly aimed at protecting single parents and parents with disabled children.

In line with Ireland’s recent introduction of divorce, ‘marital status’ now refers to the fact that a person is single, married, separated, divorced or widowed. Similarly, the protection now afforded to sexual orientation arises from the relatively recent decriminalisation of
homosexual activities between consenting adults, and from failed attempts to protect homosexuals from discrimination under the 1977 Act (McAnnellan v. Brookfield Leisure Ltd. (EEO 12/93)). ‘Sexual orientation’ means heterosexual, homosexual or bisexual orientation; the exclusion of transsexuals may be contrary to EC law (P. v. S. and Cornwall County Council ([1996] IRLR 347)). ‘Age’ is not defined, but persons over 65 or under 18 years old are generally unprotected. Differing retirement ages for employees are not automatically discriminatory, and a maximum recruitment age can be set in some circumstances. As in England and Wales, ‘the race ground’ includes race, nationality, colour, national origin or ethnic origin, but none of these is defined. Race discrimination has been of increasing concern in recent years in Ireland, as a result of greatly increased numbers of refugees and immigrants. Due to the relatively homogenous nature of Irish society, Ireland lacks any equivalent to the English race relations legislation. Legislation to tackle this issue was therefore overdue.

‘Religious belief’ includes religious background or outlook, not simply membership of a church. This is an improvement on the English position, where religious groups are only protected to the extent that they fall within the definition of ‘race’ (Seide v. Gillette Industries ([1980] IRLR 427)). However, section 37 permits limited discrimination by religious, educational or medical institutions controlled by religious bodies or with a religious ethos. These may give more favourable treatment to one religious group, if this is reasonable to maintain their religious ethos, or take action to prevent an employee from undermining that ethos (though they cannot discriminate on other grounds, such as gender). This was one of the most controversial aspects of the 1996 Bill, particularly given the decision in Eileen Flynn v. Sisters of the Holy Faith ([1985] ILRM 336). In that case, a secondary school teacher’s dismissal from a convent school was upheld as fair, as her extra-marital pregnancy and affair with a married man demonstrated that she rejected Catholic values and was an unfit role model for students. (A similar decision was reached in England in Berrisford v. Woodard Schools ([1991] IRLR 247)). The equivalent 1996 provision was found to be constitutional by the Supreme Court, and section 37 is therefore good law.

**Changes in equal remuneration principles**

The provisions dealing with equal pay largely parallel previous legislation, although some important changes are made. The claimant and comparator must now be employed at the same or any other ‘relevant time’, defined as meaning within three years of each other, but need no longer necessary work in the ‘same place’, thus allowing potentially nationwide claims. Indirect discrimination pay claims are expressly permitted, and work of equal value includes work greater in value. However, pension rights have been excluded from the definition of ‘remuneration’, leaving a major lacuna in terms of equal pay. The Pensions Acts, 1990-1996, prohibit gender discrimination with regard to pension entitlements, but new legislation will be required to deal with the other discriminatory grounds.

Opportunities for change have also been missed. There is still no room to claim pay parity with hypothetical persons. Section 6 provides that discrimination occurs where, on a prohibited ground, a person is treated less favourably than another is, has been, or would be treated. However, sections 19 and 29 limit pay comparisons to a person who ‘is employed’ by the same employer at the ‘relevant time’. This could be crucial in situations where it may be impossible to find a ‘real’ comparator and ‘equal in value’ claims are not possible, for example in some ‘feminised’ sectors of the workforce.
Equal treatment

Indirect discrimination is now expressly prohibited, but the definition differs regarding gender (section 22) and the other grounds (section 31). The most significant discrepancy is that while indirect gender discrimination must be justified by ‘objective factors unrelated to sex’, indirect discrimination on other grounds is justified if it is ‘reasonable in the all the circumstances’, a much broader standard. No explanation for this distinction is given in the accompanying memorandum, and it is probable that changes will be required on the introduction of the planned EC directive on new grounds of employment discrimination.

Harassment

An important feature of the new law is that sexual and other forms of harassment are specifically prohibited. Section 23 prohibits opposite-sex harassment by fellow employees, employers or clients or customers of the employer. Clients and customers include any person with whom the employer might reasonably expect the employee to come into contact in the course of employment. However, the employer will only be liable for client harassment where he ought reasonably to have taken steps to prevent the harassment occurring. This presumably requires an element of employer control, as discussed in Burton v. De Vere Hotels ([1996] IRLR 596) and in the Irish Labour Court decision in A Company v. A Worker (DEE 3/1991). This apart, it is irrelevant whether the harassment occurs in the workplace or otherwise in the course of the complainant’s employment. Section 32 makes similar provision for harassment based on other grounds, including sexual orientation; this resolves the difficulties raised in England by Smith v. Gardner Merchant Ltd. ([1998] IRLR 510) and in Ireland by Brookfield Leisure (above).

The Act’s broad approach clearly places the onus on employers to ensure that harassment is both officially prohibited and practically discouraged. This onus is increased by the wide definition of harassment. Sexual harassment includes any act of physical intimacy or request for sexual favours, or any other act or conduct which is unwelcome to the recipient (a subjective criterion), and which could be reasonably regarded as being sexually or otherwise offensive, humiliating or intimidating to the recipient (an objective requirement). ‘Conduct’ includes spoken words, gestures or pornographic displays. This definition captures both quid pro quo and abusive environment harassment, at least in the gender context. The definition of other types of harassment contains no specific reference to physical intimacy or requests for sexual favours (which might still be relevant, for example, as regards harassment based on sexual orientation), although this would presumably be caught by the general prohibition on offensive conduct.

The specific requirement of both a subjective and an objective element (rather than the previous subjective standard applied in Irish law (A Company v. A Worker (EEO492)) potentially permits the introduction of prejudicial and stereotypical views, particularly in sexual harassment cases. There has generally not been as much emphasis in Ireland as in England and Wales on issues such as the claimant’s mode of dress (Wileman v. Minilec Engineering ([1988] IRLR 144)) or sexual history and attitudes (Snowball v. Gardner Merchant ([1987] IRLR 397)), so that the issue of ‘welcomeness’ has not been as fraught. It would be regrettable if prejudicial principles were to be introduced as a result of the new Act. Further, the Act does not specify whether the reasonable person is of the same sex as the complainant, although men and women may well have different views about what is offensive. Even if the reasonable person is female, will male views be attributed to her? All
that is necessary to negate a sexual harassment claim under the 1998 Act is a finding that a reasonable person would not be offended by the conduct in question - a loaded criterion. Victims of other forms of harassment may be less at risk, as it is unlikely that it would be argued that, for example, racial harassment is normal and inoffensive, or that the victim welcomed it.

An interesting difference between sexual and other forms of harassment is contained in section 32(4). This provides that it is immaterial whether the harasser possesses the same ‘relevant characteristic’ as the victim, or whether the victim really possesses that characteristic at all. Thus, if the perpetrator harasses the victim because he believes the latter is gay, this is discrimination, regardless of the sexual orientation of either perpetrator or victim. All that is required is that the conduct was unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to a gay person.

**Liability for discrimination**

The issue of employer liability for sexual harassment has been a vexed one in Irish law. Since the 1977 Act did not deal with vicarious liability, the common law principle that liability was limited to acts done in the course of the employee’s employment applied. As in England and Wales, this was interpreted to mean that the employee had to be doing something so connected with his employment function as to be a means of doing it, and employers could generally argue that harassment was not connected with the job function of an employee (Health Board v. B.C. and the Labour Court (above)). Although this difficulty was apparently resolved in England and Wales by the Court of Appeal decision in Jones v. Tower Boot Co. Ltd. ([1997] IRLR 168), a similar approach was not applied in Ireland.

Regarding discrimination generally, section 15 of the 1998 Act provides that anything done by a person in the course of his employment shall be treated as being done also by his employer, whether or not the employer knew or approved of it. A defence is provided for employers who took ‘such steps as were reasonably practicable’ to prevent the employee from doing either the specific act complained of, or from doing acts of that description. This will effectively bring Irish law into line with the English position, provided that the broader interpretation of Jones is also applied. Indeed, this may not even be necessary, as sections 23 and 32 specify that harassment shall constitute discrimination by the employer.

Strong victim protection provisions are enacted. Employer discrimination occurs if an employee is harassed, and is treated differently in the workplace because she accepted or rejected the harassment. It is a defence for an employer to show that it took such steps as were ‘reasonably practicable’ to prevent the harassment from occurring, or to reverse any discriminatory treatment that the employee suffered as a result of rejecting the harassment.

**Enforcement**

The 1998 Act greatly changes equality enforcement procedures and bodies. It creates the office of Director of Equality Investigations, whose staff includes equality officers and equality mediation officers. Most claims are to be referred to the Director, but dual jurisdiction may arise in some cases. This is because the 1998 Act provides that dismissal cases are referred to the Labour Court, but dismissal actions on many of the prohibited grounds are already heard by the Employment Appeals Tribunal under the unfair dismissals legislation (the remedies available in each are identical). If the claim relates to gender or is
subject to the Equal Pay or Equal Treatment Directives (Directives 75/117 and 76/207 EEC), it may be referred to either the Director or the Circuit Court. Gender dismissal cases may be referred to the Labour or Circuit Courts. (Gender dismissal cases are not heard by the Employment Appeals Tribunal).

The dual jurisdiction for gender claims brings Irish law into line with the judgment of the European Court of Justice in Marshall v. Southampton and South-West Area Health Authority (No. 2) ([1993] IRLR 445). This provided that claims for discriminatory dismissal in breach of the Equal Treatment Directive (Directive 76/207 EEC) could not be subject to maximum awards. However, the Director and the Labour Court could not be given unlimited jurisdiction, as this might lead to constitutional difficulties. Accordingly, to implement Marshall, claimants were permitted to claim before the Circuit Court in appropriate cases, and the Court’s usual £30,000 restriction on awards was lifted. The only limits on the Court’s jurisdiction in gender equality cases are that only six years’ arrears can be awarded in equal pay claims, and compensation for discrimination is limited to the six years prior to the claim. It remains to be seen what approach will be taken in the proposed EC directive on employment discrimination based on disability, race, religion, age and sexual orientation. If, as for gender, caps on awards are not permitted, the Circuit Court’s jurisdiction may have to be extended.

Finally, the Act contains interesting provisions for mediation, and also allows the Circuit Court to refer cases to the Director for investigation by an equality officer. In this way, it is envisaged that the Circuit Court will be able to avail of the expertise built up by the equality officers under the earlier legislation.

Conclusion

The 1998 Act greatly expands the scope of equality law in Ireland, and is therefore to be welcomed. It is particularly to be commended for finally dealing with some difficult issues, such as harassment, although its approach to sexual harassment is likely to lead to difficulties. It is regrettable, however, that the Act did not go further in the protection it affords to the new groups, especially as regards indirect discrimination. It is likely that this aspect of the Act, and others, will have to be altered on the introduction of the proposed new EC employment equality directive.
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